

LIBRARY
SUPREME COURT, U. S.

1955
HAROLD B. WILLEY, Clerk

Nos. 332 and 333

In the Supreme Court of the United States

OCTOBER TERM, 1955

NO. 332

WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY.

NO. 333

UNION PACIFIC RAILROAD COMPANY, ET AL.,
Appellants,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

MOTION TO REVERSE

BERT L. OVERCASH,
*Counsel of Record for
the Five State Appellants
in No. 332,*
State Capitol Building,
Lincoln, Nebraska.

ELMER B. COLLINS,
*Counsel of Record for
Railroad Appellants in
No. 333,*
1416 Dodge Street,
Omaha, Nebraska.

INDEX

	Page
Statement	2
Argument	6
Conclusion	22
Cases Cited:	
Alabama Power Co. v. Ickes, 302 U. S. 464.....	13
Altón R. Co. v. United States, 315 U. S. 15.....	11
A., T. & S. F. Ry. v. United States, 279 U. S. 768.....	11
Atlantic Coast Line R. Co. v. U. S., 284 U. S. 288, 295.....	19
Bates v. United States, 75 S. Ct. 529.....	2
Boston Tow Boat Co. v. U. S., 321 U. S. 632.....	14
Calvaresi v. United States, 75 S. Ct. 522.....	2
Chicago Junction Case, 264 U. S. 258.....	8, 12, 20
Claiborne-Annapolis Ferry v. U. S., 285 U. S. 382.....	11
Ford Motor Co. v. Labor Board, 305 U. S. 361.....	21
Goodman Lumber Co. v. United States, 301 U. S. 669.....	2
Edward Hines Trustees v. U. S., 263 U. S. 143.....	10
I. C. C. v. Columbus & Greenville Ry., 319 U. S. 551.....	19
Interstate Comm. Comm. v. Ill. Cent. R. R., 215 U. S. 452.....	20
Interstate Com. Com. v. Mississippi Public Service Com., 75 S. Ct. 599.....	2
Manufacturers Ry. Co. v. United States, 246 U. S. 457.....	8, 9, 20
Moffat Tunnel League v. U. S., 289 U. S. 113.....	10, 14
Moore v. United States, 75 S. Ct. 531.....	2
Pittsburgh & W. Va. Ry. v. U. S., 281 U. S. 479.....	10
Railroad Co. v. Ellerman, 105 U. S. 166.....	13
Rochester Tel. Corp. v. U. S., 307 U. S. 125.....	9
Schenley Corp. v. United States, 326 U. S. 432.....	14
Seaboard Air Line R. R. Co. v. U. S., 75 S. Ct. 579.....	2
Simon v. United States, 75 S. Ct. 531.....	2
Smaldone v. United States, 75 S. Ct. 523.....	2

INDEX-Continued

	Page
Smalls v. Atlantic Coast Line R. R. Co., 75 S. Ct. 439.....	2
A. O. Smith Corp. v. United States, 301 U. S. 669.....	2
Spyunt & Son v. United States, 281 U. S. 249.....	10, 14
Standard Oil Co. v. United States, 283 U. S. 235.....	9, 20, 21
State of Montana v. State Board of Land Commissioners, 75 S. Ct. 524.....	2
Tennessee Power Co. v. T. V. A., 306 U. S. 118.....	13
Thompson v. United States, 343 U. S. 549.....	14, 15, 16, 17, 18, 19
United States v. Atlanta, B. & C. R. Co., 282 U. S. 522.....	6, 8
United States v. Los Angeles R. R., 273 U. S. 299.....	10
United States v. Mo. Pac. R. Co., 278 U. S. 269.....	12, 19
U. S. v. Great Northern R. Co., 343 U. S. 562.....	7, 14, 19
Ward Transport Inc. v. U. S., 75 S. Ct. 570.....	2
Western Pacific v. South. Pac. Co., 284 U. S. 47.....	11
Williamsport Co. v. United States, 277 U. S. 551.....	2
Statutes Cited:	
Interstate Commerce Act, as amended, 49 U. S. C. §§ 1, et seq.:	
Section 1(4)	16
Section 15(3)	4, 14
Section 15(4)	4, 12, 14, 15, 16, 19
Section 15(4)(b)	5
United States Code, Title 28:	
Section 1253	2
Section 1336	6, 20
Section 1338	6
Section 2101(b)	2
Section 2284	2
Section 2325	2
Urgent Deficiencies Act, 38 Stat. L. 219 (28 U. S. C. 1336, 1338)	6, 20, 21

Nos. 332 and 333

In the Supreme Court of the United States

OCTOBER TERM, 1955

NO. 332

WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY.

NO. 333

UNION PACIFIC RAILROAD COMPANY, ET AL.,
Appellants,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

MOTION TO REVERSE

Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission, appellants in No. 332, and Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great

Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company, and Wabash Railroad Company, appellants in No. 333, move that this Court, without awaiting briefs and oral arguments, reverse the judgment of the district court on the ground that it is so plainly erroneous as not to need further argument.²

STATEMENT³

This is a direct appeal from a final judgment entered February 14, 1955, by a three-judge district court convened pursuant to 28 U. S. C. 2284, 2329, annulling

1. Appellants in No. 334, *United States of America and Interstate Commerce Commission v. The Denver and Rio Grande Western Railroad Company*, also seek to reverse the judgment of the district court described herein.
2. See *Williamsport Co. v. United States*, 277 U.S. 551, 556-557. Counsel for appellants realize that this Court's rules do not expressly provide for a motion to reverse. However, this Court for several years has frequently disposed of similar direct appeals under the same statutory provisions, (28 U.S.C. 1253 and 2101(b)) by affirming the three-judge district courts' judgments without awaiting briefs and oral arguments. *Goodman Lumber Co. v. United States*, and *A. O. Smith Corp. v. United States*, 301 U.S. 669 (June, 1937); *Ward Transport Inc. v. U.S.*, 75 S. Ct. 570; *Seaboard Air Line R.R. Co. v. U.S.*, 75 S. Ct. 579; *Interstate Com. Com. v. Mississippi Public Service Com.*, 75 S. Ct. 599.

Power to dispose of such appeals without briefs and oral arguments apparently is the same whether by affirming district court judgments that are plainly correct or by reversing judgments that are plainly erroneous.

In the interests of justice and in the exercise of its "supervisory powers," this Court has frequently granted certiorari and reversed judgments and remanded cases without briefs or oral arguments on the merits. *Smalls v. Atlantic Coast Line R.R. Co.*, 75 S.Ct. 439; *Calvaresi v. United States*, 75 S.Ct. 522; *Smaldone v. United States*, 75 S.Ct. 523; *State of Montana v. State Board of Land Commissioners*, 75 S.Ct. 524; *Bates v. United States*, 75 S.Ct. 529; *Moore v. United States*, 75 S.Ct. 531; *Simon v. United States*, 75 S.Ct. 531.

3. For a more detailed statement of the case see Appellants' Statements as to Jurisdiction, Nos. 332 and 333.

and setting aside an alleged "order" of the Interstate Commerce Commission. On April 22, 1955, the court entered an order overruling and denying a motion for new trial or reargument and reconsideration. The Commission's alleged order resulted from a complaint filed by The Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande") for the admitted purpose of improving its financial condition by diverting for a "bridge" haul over its line traffic originated and terminated on through routes of the Union Pacific Railroad Company and other railroads and hauled under joint rates maintained over those routes through Wyoming and Nebraska for 75 years, between points in the northwest area, embracing the States of Oregon, Washington, Montana and Idaho, and points in the eastern and southern parts of the United States.⁴

The joint rates do not apply via the Rio Grande and they are lower than the combination or sum of the local rates that would have to be charged if the traffic moved via that line.

The Rio Grande demanded that its line be included at equal joint rates in the many hundreds of thousands of existing through routes between the 39,000 railroad stations in the east and south and the 2,900 stations in the northwest area just indicated. It made this demand despite the facts, found by the Commission, that the Rio Grande has no trackage and performs no service in that area; that any route via the Rio Grande for movement of the involved traffic would be from 33 to 219 miles

⁴ The lines and termini of the Union Pacific and the Rio Grande (main lines) are indicated on the map attached as Appendix A to Statement as to Jurisdiction filed herein by Union Pacific Railroad Company, et al., No. 333.

longer than the Union Pacific and would range from 33 per cent to more than 50 per cent longer than many routes maintained by the Union Pacific with other railroads; that movement of the traffic over the Rio Grande as a "bridge" line would require at least 24 hours more time and one or two more terminal interchanges between carriers, and would short haul the Union Pacific and other railroads 925 miles.

The Commission further found that Union Pacific routes are not only shorter and faster than the Rio Grande but are also efficiently operated, have surplus capacity and are adequate to move over their "direct routes" the present volume of traffic and any additional volume that may be anticipated in the foreseeable future; and it also found that the route of the Rio Grande is longer and "less favorably situated" than that of the Union Pacific, and that "operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental" lines.

The Rio Grande contended before the Commission that through routes at the combination or sum of local rates already existed via its line in connection with the Union Pacific and demanded that the lower joint rates maintained over Union Pacific routes be made applicable via its line, without regard to the short-hauling prohibition in Section 15(4) of the Interstate Commerce Act (App. II, p. 4, Railroad Appellants' Statement as to Jurisdiction, No. 233).

The Commission held that the through routes claimed by the Rio Grande did not exist for the involved traffic within the meaning of Section 15(3) and (4) of the Act and that if through routes and joint rates were ordered via the Rio Grande they would have to be grounded on

findings required by Section 15(4)(b), which permits the Commission to short haul existing routes only if it finds that "the through route *proposed* to be established is needed in order to provide adequate and more efficient ~~or~~ more economic transportation". The Commission found that through routes via the Rio Grande were "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" for certain commodities which comprise about one-third of the total volume of the traffic the Rio Grande seeks to divert to its line. The Commission concluded that, except as indicated in its findings, "the allegations made in the complaint are not sustained." The order issued requires that joint rates "the same" as those maintained over existing Union Pacific routes be made applicable via the Rio Grande to the commodities named in the order.

The order does not in terms deny, dismiss or withhold anything, nor does it make any reference to the remaining two-thirds of the traffic the Rio Grande seeks to divert to its line. For the purpose of having the Commission order through routes and joint rates via its line on the remaining two-thirds of the traffic, the Rio Grande brought this suit to enjoin and annul the Commission's *failure* to include that two-thirds of the traffic in the order it issued.

The district court overruled a motion to dismiss the case on the ground that, as the Rio Grande admittedly has no legal or other right to improve its financial position by diverting traffic from other railroads, it has no standing to maintain the suit. The court further held that through routes via the Rio Grande are already in existence for the involved traffic, that the Commission erred as a matter of law and upon the evidence in finding

that the claimed routes are not in existence, and that this finding by the Commission "obviously prejudiced the entire proceeding". The court enjoined and annulled the alleged "order" insofar as it denied and withheld relief from the Rio Grande, and "remanded" the case to the Commission for further proceedings in conformity with the court's opinion "insofar as the aforesaid order of the Interstate Commerce Commission denied and withheld relief" to the Rio Grande (Apps. D, E and F, Railroad Appellants' Statement as to Jurisdiction, No. 333; decision reported August 1, 1955, *Denver & Rio Grande Western R. Co. v. United States*, 131 F. Supp. 372).

ARGUMENT

1. The district court treated the Commission's failure to require through routes and joint rates on the remaining two-thirds of the traffic as a "part" or a "negative portion" of the affirmative order issued. But examination of the order (App. C, Railroad Appellants' Statement as to Jurisdiction, No. 333) shows that this is clearly erroneous. While the Commission's report ends with the conclusion that, "except as indicated in the preceding findings, the allegations made in the complaint are not sustained", this conclusion is not mentioned in the order issued.

This Court has held that the Urgent Deficiencies Act (38 Stat. L. 219; 28 U. S. C. 1336, 1338) confers no jurisdiction upon the courts to review "matter embodied in a [Commission] report and not followed by a formal order", *United States v. Atlanta, B. & C. R. Co.*, 282 U. S. 522, 528. In that case the Commission had made a finding of the amount representing the railroad company's investment in road and equipment. It issued no order, but concluded its report with this statement:

7

"The company will be expected to adjust its accounts in accordance with this finding within 60 days from service of this report."

Rejecting the railroad's contention that the quoted language "amounts to an order", this Court held that jurisdiction to review was lacking because "*the action here complained of is not in form an order*", and, instead, "*is a part of a report—an opinion as distinguished from a mandate*". (Italics added.)

That Act clearly makes the existence or presence of an "order" embodying the matter complained of the requisite to jurisdiction to review. There is no such order here. The order issued does not deny, dismiss or withhold anything. There is no "negative portion" of that order. It is a positive mandate to more than 200 railroads to establish in connection with the Rio Grande through routes and joint rates on a third of the traffic it seeks to divert from other railroads. But most assuredly the Rio Grande does not want that order enjoined, for every "part" of it is completely favorable to the Rio Grande, and indeed, it is now defending the validity of that order before this Court, No. 117, *The Denver & Rio Grande Western Railroad Company v. Union Pacific Railroad Company, et al.* The Rio Grande is clearly seeking in the instant case to enjoin and annul an alleged "order" that has not been issued, namely, an order "denying" the Rio Grande's demand for through routes and joint rates on the remaining two-thirds of the traffic.⁵

⁵ The order reviewed in *U.S. v. Great Northern R. Co.*, 343 U.S. 562 (No. 351, Oct. Term 1952) [Transcript of Record, pages 14-23], "denied" an application to abandon the Montana Western, ordered joint rates in lieu of combination rates, and prescribed division of the joint rates.

(Continued on next page)

As stated in *United States v. Atlanta, B. & C. R. Co.*, *supra*, page 528:

"No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review."

In *Manufacturers Ry. Co. v. United States*, 246 U. S. 357, the Commission had issued an order requiring certain carriers to establish joint rates, but it declined to comply with the demand of some of the carriers that it also prescribe divisions of the joint rates required. This Court reviewed the affirmative order issued but refused to review the Commission's failure to fix divisions, holding that in seeking review of the Commission's failure to fix divisions, the appellants were in effect asking the Court to "exercise administrative authority where the Commission has failed or refused to exercise it". In *Chicago Junction Case*, 264 U. S. 258, the Court cited a number of cases at page 264, in which the Court said, judicial review was refused "not because the order * * * was negative in character," but that this Court declined to interfere "because to do so would have involved exercise by it of the administrative function of granting the relief" which the Commission had failed to grant.

(Continued from preceding page)

And compare orders granting "in part" and denying "in part," applications for motor carrier operating rights. In such proceedings the Commission's report generally relates the extent to which the evidence justifies the application, and an order is entered, as follows:

"It is ordered, That said application, except to the extent granted in said report, be, and it is hereby, denied." (No. MC-61396 (Sub-No. 32) Herman Bros. Inc., Extension—Kansas and Other States, June 30, 1933, unreported.)

While the district court said that the fact that "the portion of the order here assailed was negative in character, no longer affords a ground for the denial of judicial relief", it is plain that the court either confused the abolition of the "negative order doctrine" by *Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, with the jurisdictional necessity for an actual formal order embracing the matter of which the Rio Grande complained, or it attempted to "stretch" the ruling in the *Rochester* case to include a case in which the Commission has issued no order at all embodying its failure to grant all the Rio Grande's affirmative demands. Since that failure, and not the affirmative order issued, was the gravamen of the Rio Grande's complaint, the district court plainly should have dismissed the suit for lack of jurisdiction. It is certain that the complaint would have been dismissed for lack of jurisdiction in *Manufacturers Ry. Co. v. United States*, *supra*, if it had attacked only the Commission's failure to fix divisions of the joint rates if had required by its affirmative order.

2/ The Rio Grande's complaint to the Commission demanded joint rates that would afford it the opportunity to improve its financial position by short-hauling the appellant railroads 925 miles and diverting for a "bridge" haul over its line through traffic from which the Union Pacific alone earns over \$49,000,000 annually. The order issued by the Commission grants the demand to the extent of about one-third of the traffic from which the Union Pacific earns over \$11,000,000 annually. The Rio Grande filed this suit in the district court for the purpose of obtaining equal joint rates which it "failed to secure from the Commission" on the remaining two-thirds of the traffic (see *Standard Oil Co. v. United States*, 283 U. S. 235, 241).

The district court conceded that the Commission's failure to grant the full demands "required no affirmative action by the Rio Grande" and took nothing away from the Rio Grande which it already had", and from that standpoint, "caused no pecuniary loss to the Rio Grande", but that, nevertheless, it would prevent the Rio Grande "from enjoying increased traffic and increased earnings" and, therefore, "will result in pecuniary injury to the Rio Grande", giving it a right to judicial review (App. D, pp. 20-21, Railroad Appellants' Statement as to Jurisdiction, No. 335).

Keeping in mind the consistent rulings of this Court, the fact that the Rio Grande's only purpose in prosecuting this suit is to reap financial gain beyond the extent permitted by the Commission's order, and the fact that the Rio Grande has no legal or other right to enhance its financial position by diverting traffic from other railroads, it is clear beyond doubt that the district court erred in holding that the Rio Grande has standing to maintain this suit.

This Court has consistently held that standing to maintain a suit to enjoin an order of the Commission requires a showing that the order assailed subjects the complainant to legal injury, actual or threatened, *Edward Hines Trustees v. U. S.*, 263 U. S. 143; *Sprunt & Son v. United States*, 281 U. S. 249, 257; *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479, 486; *Mead Tunnel League v. U. S.*, 289 U. S. 113, 119; or that the order would deprive the complainant of something it has long and lawfully possessed, or would disrupt the transportation situation causing the complainant financial or economic

6. Compare *United States v. Los Angeles R.R.*, 273 U.S. 299, 309-310.

loss, or that the right to maintain such suit rests upon some express statutory provision, *Western Pacific v. South. Pac. Co.*, 284 U. S. 47; *Claiborne-Annapolis Ferry v. U. S.*, 285 U. S. 382; *Chicago Junction Case*, 264 U. S. 258, 267; *Alton R. Co. v. United States*, 315 U. S. 15, 19.

This Court also held in *A. T. & S. F. Ry. v. United States*, 279 U. S. 768, 780, that:

"There is no rule of law or practice which gives to a carrier the right to recapture traffic which it originated."

If, as held in that case, the railroads that originate and terminate the traffic have no right to retain it to their lines, or—as argued by the Rio Grande in the district court—have no "absolute" or "unequivocal" right to their long hauls, then, *a fortiori*, the Rio Grande, which neither originates nor terminates the traffic, can claim no semblance of a legal or other right to enhance its financial position by diverting for a "bridge" haul over its line traffic originated and terminated by these railroad appellants and hauled by them for 75 years over their shorter, faster and more efficient routes.

7 On this point the Rio Grande argued as follows at page 114 of its original brief in the district court:

"Neither the Union Pacific nor any other railroad has an absolute right to the exclusive occupancy of a particular territory or to the traffic which terminates or originates in the territory. *Pennsylvania R. Co. v. United States*, 40 Fed. (2) 921; *Indian Vellcy R. Co. v. United States*, 52 Fed. (2) 485, and *Chesapeake and Ohio Ry. Co., Construction*, 267 I.C.C. 665, 679. In *United States v. American Railway Express Co.*, 265 U.S. 425, 437, the court held that a carrier has no absolute right to the traffic it originates or to its long haul. Such rights as a railroad may have to its long haul on interstate commerce are granted and limited by the Interstate Commerce Act. Moreover, that Act does not give the originating railroad or any railroad the unequivocal right to its long haul in connection with through routes."

The purpose of the short-hauling prohibition in Section 15(4) of the Act is "to protect the long haul routes of carriers", *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, 277, and it is a distortion of that purpose to contend or suggest that there is any hint of a legislative sanction of a right in the Rio Grande to short haul the railroad appellants 925 miles so that it may improve its financial condition by diverting for a "bridge" haul over its line through traffic originated and terminated on the lines of the railroad appellants. Indeed, Section 15(4) requires that the Commission shall—if it orders a new through route—"give reasonable preference to the carrier by railroad which originates the traffic." And that section contains the further mandate that:

"No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

All of this, we submit, conclusively demonstrates that the Rio Grande has no semblance of a legal or other right to take from Union Pacific routes the traffic it seeks, and, hence, no standing to maintain this suit.

Although the district court refrained from specifying the ground or reason for its holding that the Rio Grande has standing to maintain the suit, it did hold that the Rio Grande here seeks rates that "will result in pecuniary profit to the Rio Grande * * * the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings" (App. D, p. 25, Railroad Appellants' Statement as to Jurisdiction, No. 333), and that "the denial of the relief here challenged will result in pecuniary injury to the Rio Grande", but that such injury is not essential to the right to judicial review. (Id. pp. 20-21.)

In final analysis, and though lacking in clarity and specificity, the court's decision that the Rio Grande has standing to maintain the suit inescapably rests upon the proposition that, regardless of its utter lack of any legal or other right to the traffic it seeks, the Rio Grande has standing to maintain this suit because the Commission failed to grant its demands for an opportunity to reap "pecuniary profit" and enhance its revenues from *all*, instead of a part, of the traffic it seeks to divert for a "bridge" haul over its line.

There is no precedent for the court's holding, and it is directly contrary to the decisions cited above and to the rule laid down by this Court that in order to maintain a suit to enjoin acts of others the complainant must show that he is threatened not only with a "loss" but also one against which he is legally or equitably entitled to protection. *Railroad Co. v. Ellerman*, 105 U. S. 166; *Alabama Power Co. v. Ickes*, 302 U. S. 464; *Tennessee Power Co. v. T. V. A.*, 306 U. S. 118. If, as held in the cases just cited, a complainant has no standing to maintain a suit to enjoin acts of others *which threaten even to destroy his business* unless he shows that such acts invade some legal or equitable right of his own, *a fortiori* the Rio Grande has no standing to maintain suit to enjoin the Commission's failure to grant its full demands for "pecuniary profit" to be obtained by diverting to its line traffic to which it admits that it has no semblance of legal or other right, and the refusal of the district court to so hold clearly should be reversed.⁸

8 The American Short Line Railroad Association and several shipper organizations intervened as plaintiffs supporting the Rio Grande's complaint in the district court. That court did not comment on the question whether the interveners have any "independent" right
(Continued on next page)

3. The district court, in reversing the Commission's finding that through routes claimed by the Rio Grande are not in existence within the meaning of the Act, misconstrued or refused to be guided by this Court's decision in *Thompson v. United States*, 343 U. S. 549, and by the principle stated in *U. S. v. Great Northern R. Co.*, 343 U. S. 562, concerning proof of the existence of through routes and the legislative policy against diversion of traffic from one carrier for the benefit of another.

Although stating that the definition of "through route" in the *Thompson* case "compels us to conclude

(Continued from preceding page)

or standing to sue, but obviously they have not, for, like the Rio Grande, they suffered no loss but, instead, gained a financial benefit from the order, and sought merely to reap "pecuniary profit" beyond and in addition to that permitted by the order. Their right to intervene in the Rio Grande's suit gave them no right to maintain a suit, independent of the Rio Grande's, to enjoin the alleged order. *Sprunt & Son v. United States*, 281 U. S. 249, 252-258; *Schenley Corp. v. United States*, 326 U. S. 432, 435; *Boston Tow Boat Co. v. U. S.*, 321 U. S. 633, 634; *Moffat Tunnel League v. U. S.*, 289 U. S. 113, 120. And since, as we have shown, the Rio Grande had no standing to maintain its suit, the interveners' complaints, along with the Rio Grande's, clearly should have been dismissed by the district court.

9 In the *Thompson* case this Court held at pages 557-558 that: "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service."

"In this case there is no evidence that any through transportation service has ever been offered from Lepora to Omaha via the Burlington. The carriers' course of business negatives the existence of any such through route. The fact that appellant's line connects with the Burlington at Concordia does not aid the Commission in proving the existence of a through route, since the power to establish through routes under Section 15 (3) and (4) also presupposes

(Continued on next page)

that the through routes contended for by the Rio Grande were in existence", the district court does not indicate which of the several elements of that definition compels such conclusion. But this Court's opinion in that case clearly shows at page 557 that the existence or absence of a through route is to be determined by consideration of the various incidents which tend "to establish a carrier's course of business with respect to through shipments." It is the "course of business"—not the exceptions to or departures from it—that governs.

The district court merely states that in the *Thompson* case there was no evidence that a shipment had ever been made from terminus to terminus (Lenora, Kans., to Omaha, Nebr., via the Missouri Pacific and Burlington railroads) of the route there in question or that the carriers had ever offered through service over that route. As if to prove a different case, the court then points to 18 shipments moved at combination of local rates in 1948 over the Rio Grande from 18 origins in the middlewest and southwest to destinations in the northwest area and to a few war and blizzard emergency shipments, and 37 shipments that moved from the northwest to destinations on the Rio Grande. Neither the latter nor the emergency shipments could prove anything in this case, for the "emergency" shipments are expressly exempted from the short haul prohibition by the last sentence of Section 15(4) to take care of "temporary" emergencies, and the 37 shipments to points on the Rio Grande were not

(Continued from preceding page)

such physical connection. And the showing that appellant publishes a local rate from Lenora to Concordia and that the Burlington publishes a local rate from Concordia to Omaha proves only that each carrier complies with the statutory duty to publish rates for transportation service between points on its own lines.

"through" shipments of the "bridge" traffic sought by the Rio Grande.

The *Thompson* decision, page 557, footnote 13, makes it plain enough that even if the Rio Grande had proved that one or more isolated or sporadic shipments moved via its lines over each of the innumerable routes of which it claims to be a part, it still would have failed to prove "the carriers' course of business". *A fortiori*, its showing here of 18 shipments routed via its line by shippers over 18 of the millions of existing through routes between the 39,000 railroad stations in the east and south and the 2,900 stations in the northwest area is not even a *scintilla* of proof that the "course of business" of the carriers comprising the myriad of Union Pacific routes is to offer through transportation service in connection with the Rio Grande between the northwest and the eastern and southern parts of the country.¹⁰

Such a "course of business" is negated by the fact, mentioned in the district court's opinion, that joint rates with the Rio Grande established by receivership courts in 1897, were cancelled after the receiverships terminated nearly 50 years ago. It is also negated, as the Commission said, by the steadfast refusal of the appellant railroads during, and even before, that 50-year period to relinquish their long hauls.

¹⁰ At page 559, the *Thompson* decision holds:

"Through service, to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha unless we are to hold that compliance with Section 1(4) causes the Missouri Pacific to lose its right to serve Omaha via its own lines, a right guaranteed by Section 1-5(4). We reject the Commission's argument that the existence of through routes from Lenora to points on the Burlington line short of Omaha proves the existence of a through route to Omaha via the Burlington, as requiring an unwarranted distortion of the statutory pattern." (Italics supplied.)

That the cancellation nearly 50 years ago of the joint rates established in connection with the Rio Grande by the receivership courts in 1897 fully accomplished the "closing" of the through routes in question, is and has been the understanding of all railroads and shippers generally concerned during that 50-year period. It was the understanding of 137 shipper and public witnesses who opposed the Rio Grande and of some 50 witnesses who supported its complaint before the Commission, and it was the understanding of the Rio Grande's President, who testified that, ever since he became affiliated with the Rio Grande he had looked forward "to the opening of the Ogden Gateway". It was the admitted position of Rio Grande until after this Court handed down its decision in the *Thompson* case (June 2, 1952). In its publicity campaign, conducted before and after the filing of its complaint, August 1, 1949, the Rio Grande publicly asserted that its purpose was to "restore" to the northwest the "rates and routes" established by the receivership courts in 1897. As a part of its publicity campaign, the Rio Grande printed and widely distributed a pamphlet entitled "20 Questions—An Informative Quiz", (I. C. C. Ex. 30), in which it posed 20 questions and answered them with the arguments it thought would convince shippers to aid it in its efforts to "open" through routes via its line in connection with the Union Pacific to and from the northwest area. These questions clearly and indisputably show that the Rio Grande itself considered the prior through routes via its line "closed" by the cancellation of the joint rates by the Union Pacific.¹¹

N Among the 20 questions were the following:

" 2. What is Meant by the 'Closed' Gateway at Ogden?"

" 3. What is the Effect of the Closed Gateway?"

(Continued on next page)

Every relevant or material factor recited in the opinion of the lower court in support of its conclusion that through routes exist as claimed by the Rio Grande was rejected or held insufficient by this Court in annulling the Commission's order in the *Thompson* case, because the order had the effect of reducing the short haul prohibition to "unnecessary surplusage," and was "without evidentiary support under the accepted tests for determining the existence of a through route" (pp. 560, 561).

The Commission in the instant case held that the few sporadic shipments moved in 1948 did not prove the existence of through routes via the Rio Grande for the involved traffic. Applying the principles of the *Thompson* decision, pages 557-558, the Commission correctly concluded that the carriers in this case do not "hold themselves out as offering through transportation service" for the involved traffic, as indicated by their "course of business" and by the Union Pacific's course of con-

(Continued from preceding page)

- " 4 How Does the Rio Grande Seek to Open the Ogden Gateway?"
- " 5 How Will the Rio Grande Benefit from Opening of the Ogden Gateway?"
- " 6 Why Does the Union Pacific Oppose Opening of the Ogden Gateway?"
- " 7 Will the Open Ogden Gateway Reduce Freight Rates?"
- " 8 Will the Open Gateway Provide Improved Service?"
- " 9 With Opening of the Gateway, Will There be More Freight Cars Available for Northwest Shippers?"
- "10 Will an Open Gateway at Ogden Benefit Colorado and Utah?"
- "11 Will an Open Gateway at Ogden Benefit Shippers Outside of Union Pacific or Rio Grande Territory?"
- "12 Will Opening of the Ogden Gateway Reduce Railroad Employment in the Closed-Door Territory?"
- "13 Will the Opening of the Ogden Gateway Reduce Taxes Paid in the Closed-Door Territory?"

duct over many years in its steadfast refusal to relinquish its long haul. (See App. B, p. 10, Railroad Appellants' Statement as to Jurisdiction, No. 333.)

The district court's decision is vague and lacking in specificity as to the precise reason why it holds that through routes are in existence for the involved traffic via the Rio Grande, but it sanctions a new and unprecedented standard, or set of circumstances, for escaping the short-haul prohibition of Section 15(4) and for determining the existence of through routes, which not only conflicts with the principles laid down in the *Thompson* case, but is also at war with the plain purpose of the Act in conferring the through routes power on the Commission carefully limited so as to protect the long hauls of carriers, *Thompson* case, *supra*; *United States v. Mo. Pac. R. Co.*, 278 U. S. 269; *I. C. C. v. Columbus & Greenville Ry.*, 319 U. S. 551; *Atlantic Coast Line R. Co. v. U. S.*, 284 U. S. 288, 295.

In *U. S. v. Great Northern R. Co.*, 343 U. S. 562, this Court held at page 575, that:

"Congress amended Section 15(4) to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs."

That being so, the district court clearly exceeded its authority in "tinkering" with through routes to enable the Rio Grande to reap additional "pecuniary profit" and to satiate its financial greed.

4. The district court held that the Commission's finding that through routes do not exist via the Rio Grande for the involved traffic "obviously prejudiced the entire proceeding", but the court "remands" the case to the Commission *only* "insofar as it denied and withheld relief" to the Rio Grande. Also contrary to the

Commission's finding, the court made its own administrative finding of fact that continuance of the Rio Grande's combination rates on the traffic not included in the Commission's order would result in discrimination against the Rio Grande and shippers over its line.

Thus, in remanding the case to the Commission "for further proceedings in conformity with this opinion", but only insofar as the Commission denied relief to the Rio Grande, the court would not only prevent the Commission from reconsidering the portion of the "prejudiced" proceeding which is favorable to the Rio Grande, but would also tie the Commission's hands by requiring it to reverse its previous administrative judgment and finding that the evidence did not prove discrimination against the Rio Grande. In short, apart from the fact that neither the Urgent Deficiencies Act (28 U. S. C. §1336) nor any other statute gives the court power to "remand" the case to the Commission, in doing so the court virtually directs the Commission to order joint rates on the remaining two-thirds of the traffic so that the Rio Grande may reap additional "pecuniary profit" from "increased traffic and increased earnings". The court clearly usurps the Commission's administrative authority and renders its functions useless, contrary to decisions of this Court, *Interstate Comm. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452, holding at page 470 that the courts may not "under the guise of exerting judicial authority, usurp merely administrative functions"; *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, holding at page 483, that jurisdiction to review orders of the Commission "does not permit the court to exercise administrative authority where the Commission has failed or refused to exercise it;" and *Chicago Junction Case*, 264 U. S. 258, 264. Having failed to gain its full de-

mands from the Commission, the Rio Grande turned to the district court to accomplish that objective. But the district court was without authority to aid the Rio Grande in its attempt, by "direction" or by "indirection", to obtain through the court proceeding "the same relief it failed to secure from the Commission", *Standard Oil Co. v. United States*, 283 U. S. 235, 241.

The Urgent Deficiencies Act confers authority only to "enjoin, set aside, annul or suspend in whole or in part any order" of the Commission. In making its own finding of discrimination against the Rio Grande and in "remanding" the case to the Commission for further proceedings in conformity with that finding, the court has plainly violated the elementary principle stated by this Court in *Ford Motor Co. v. Labor Board*, 305 U. S. 364, at page 373, that in exercising the power to review an administrative order—

"* * * the court must act within the bounds of the statute and without intruding upon the administrative province."

CONCLUSION

For the foregoing reasons and others more fully stated in appellants' jurisdictional statements, we submit that the decision and judgment of the district court are so clearly erroneous as not to need further argument. The judgment should accordingly be reversed by this Court without awaiting briefs and oral arguments and the case remanded to the district court with direction to dismiss the complaint.

Respectfully submitted,

BERT L. OVERCASH
*Counsel of Record for the
 Five State Appellants in
 No. 332,*
 State Capitol Building,
 Lincoln, Nebraska.

ELMER B. COLLINS,
*Counsel of Record for
 Railroad Appellants in
 No. 333,*
 1416 Dodge Street,
 Omaha, Nebraska.

DON EASTVOLD,
 ROBERT L. SIMPSON,
 C. W. FERGUSON,
 JAMES B. PATTEN,
 GEORGE F. GUY,
 CLARENCE S. BECK,
Of Counsel.

F. O. STEADRY,
 L. E. TORINUS,
 WARREN H. PLOEGER,
 ROLAND J. LEHMAN,
 EUGENE S. DAVIS,
 JAMES C. WILSON,
Of Counsel.

August, 1955.

PROOF OF SERVICE

I, ELMER B. COLLINS, one of counsel of record for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 26th day of August, 1955, I served, on behalf of all appellants herein, copies of the foregoing Motion on the several parties thereto and parties to the appeal in No. 334, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Stanley N. Barnes, Esq.
Assistant Attorney General
Department of Justice
Washington 25, D. C.

Donald E. Kelley, Esq.
United States Attorney
Post Office Building
Denver 1, Colorado

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Samuel R. Howell, Esq.
Assistant General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Robert E. Quirk, Esq.
1116 Investment Building
Washington 5, D. C.

Dennis McCarthy, Esq.
Walker Bank Building
Salt Lake City 1, Utah

Frank E. Holman, Esq.
1006 Hoge Building
Seattle 4, Washington

Ernest Porter, Esq.
603 Rio Grande Building
Denver 2, Colorado

4. On The Public Utilities Commission of Colorado by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

William T. Sedor, Esq.
Asst. Attorney General
State of Colorado
Denver, Colorado

5. On Brotherhood Committees of employees of The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with air mail postage prepaid to:.

Alden T. Hill, Esq.
Woolworth Building
Fort Collins, Colorado

6. On Pueblo Chamber of Commerce; Arkansas Valley Stock Feeders Association; Colorado Wool Growers Association; Western Forest Industries Association; Koppers Company, Inc.; Idaho Farm Bureau; Public Service Commission of Utah; Utah Growers Cooperative, Inc.; Knudsen Builders Supply Company, Inc., and Struc-

tural Steel and Forging Company, by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Barry & Hupp
738 Majestic Building
Denver 2, Colorado

7. On Holly Sugar Corporation by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Lowe P. Siddons, Esq.
Dennis O'Rourke, Esq.
Attorneys for Holly Sugar Corporation
Holly Sugar Building
Colorado Springs, Colorado

8. On The American Short Line Railroad Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

W. J. Hickey, Esq.
Vice President and General Counsel
The American Short Line Railroad Association
2000 Massachusetts Avenue, N. W.
Washington 6, D. C.

ELMER B. COLLINS,
*One of Counsel of Record
for Appellants Herein.*